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In The
Supreme Court of the United States
October Term, 1984

DONALD A. CABANA,
SUPERINTENDENT, ET AL.,
v. *Petitioners,*
CRAWFORD BULLOCK, JR.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR STATES OF GEORGIA, FLORIDA, INDIANA AND WYOMING AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The States of Georgia, Florida, Indiana and Wyoming by their Attorneys General will address the following question:

I.

Whether the United States Court of Appeals for the Fifth Circuit misconstrued this Court's holding in *Enmund v. Florida,* 458 U.S. 782 (1982), by requiring a trial court to give specific instructions to the jury on an individual defendant's culpability.

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INTEREST OF AMICI CURIAE

The instant brief is submitted on behalf of the States of Georgia, Florida, Indiana and Wyoming by their Attorneys General. Said brief is submitted in support of the position taken by the Petitioners in the instant action. The State of Georgia has a bifurcated sentencing proceeding for capital cases as does the State of Mississippi and also has provisions for the conviction of an individual for felony murder or for aiding and abetting in the commission of a crime. Under Georgia law, there is no requirement that a specific instruction be given to the jury to find that an individual either intended to kill, attempted to kill or con-

templated that life be taken before a death sentence can be imposed. In a case arising out of the State of Georgia, the Eleventh Circuit Court of Appeals sitting *en banc* has ruled contrary to the Fifth Circuit Court of Appeals. *Ross v. Kemp*, 756 F.2d 1483 (11th Cir. 1985) (*en banc*). The State of Georgia has the interest in preserving its death sentences and in preserving the holding of the Eleventh Circuit pertaining to this issue. The States of Florida, Indiana and Wyoming have similar interests in the instant case.

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STATEMENT

Respondent, Crawford Bullock, Jr., was found guilty of the crime of capital murder on May 18, 1979 in the Circuit Court of the First Judicial District of Hinds County, Mississippi. Pursuant to the Mississippi statutory bifurcated sentencing procedure, the Respondent received the death penalty; said sentence was subsequently affirmed by the Mississippi Supreme Court. *Bullock v. State*, 391 So. 2d 601 (Miss. 1980). A petition for a writ of certiorari was denied by this Court on June 8, 1981. *Bullock v. Mississippi*, 452 U.S. 931 (1981).

Respondent subsequently filed an application for leave to file a petition for a writ of error coram nobis with the Mississippi Supreme Court and simultaneously filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Mississippi. Identical grounds were contained in these two petitions. On October 7, 1981, the state application for post-convic-

tion relief was denied. On July 22, 1983, a final judgment was entered in the district court denying relief and a certificate of probable cause to appeal was denied. The court subsequently reversed its position on the certificate of probable cause to appeal.

The case was then appealed to the United States Court of Appeals for the Fifth Circuit. On September 21, 1984, that court reversed the decision of the district court as to the sentencing phase based on a finding of a violation of *Enmund v. Florida*, 458 U.S. 782 (1982). *Bullock v. Lucas*, 743 F.2d 244 (5th Cir. 1984). A subsequent petition for panel rehearing and suggestion for rehearing *en banc* were denied without opinion. *Bullock v. Lucas*, 747 F.2d 1464 (5th Cir. 1984). Petitioners then filed a petition for a writ of certiorari in this Court dated January 29, 1985. Certiorari was granted by this Court on April 22, 1985. *Cabana v. Bullock*, 53 U.S.L.W. 3757 (U.S. April 22, 1985).

SUMMARY OF ARGUMENT

The decision by this Court in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982), clearly involves a proportionality review under the Eighth Amendment's prohibition against cruel and unusual punishment. This Court in *Enmund* prohibited the imposition of the death penalty on one who simply aided and abetted in the commission of a felony, but did not kill, attempt to kill or intend that a killing take place or contemplate that lethal force might be employed. *Enmund, supra*, 102 S.Ct. at 3376. At no

time did the Court set forth a requirement that there be some type of special verdict by either the trial jury or the sentencing jury finding such intent on the part of a defendant. The very nature of an Eighth Amendment analysis contemplates review by an appellate court or court on collateral review and not by the trial jury itself. The question presented under *Enmund* is simply whether the death penalty imposed in any given case is disproportionate in light of the facts and circumstances of that case, not whether the jury specifically found that the defendant had the requisite mental state. The holding by the Fifth Circuit Court of Appeals in the instant case requiring such a specific jury finding extends the holding of *Enmund v. Florida, supra*, past the limit set by this Court and recognized in later cases, and ignores the fact that the decision is solely a proportionality review. Thus, the decision by the Fifth Circuit Court of Appeals to this extent should be reversed.

ARGUMENT

I. There Is No Constitutional Requirement Of A Specific Jury Finding Of Individual Culpability Before A Death Sentence May Be Imposed In Any Individual Case Under Enmund v. Florida, 458 U.S. 782 (1982).

In the instant brief, the States of Georgia, Florida, Indiana and Wyoming specifically address the question of whether or not the Fifth Circuit Court of Appeals improperly required a finding by the jury that Respondent "either killed, attempted to kill, or intended a killing or

the use of lethal force." *Bullock v. Lucas*, 743 F.2d at 247. In the instant case, the Fifth Circuit Court of Appeals followed its reasoning in *Reddix v. Thigpen*, 728 F.2d 705 (5th Cir.), *rhng. denied*, 732 F.2d 494 (5th Cir. 1984). The court relied on this Court's opinion in *Enmund v. Florida*, 458 U.S. 782 (1982), but extended that holding to conclude that a specific jury verdict was necessary. Amici curiae submit that no such specific verdict is necessary under an Eighth Amendment analysis as was conducted in *Enmund v. Florida* and under the circumstances of the instant case.

In *Enmund v. Florida, supra*, this Court was faced with the question of "whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.*, 102 S.Ct. at 3376-7. The Court noted that the question was "the validity of capital punishment for Enmund's own conduct." *Id.* Thus, the Court focused on Enmund's personal culpability and not the other persons involved in the crimes. The Court thus concluded that the record before it did not support a finding that Enmund killed or attempted to kill and that the Florida Supreme Court had not made any such findings. The Court concluded that under the Eighth Amendment, Enmund's culpability was different from that of the robbers who killed and that Enmund could not be sentenced to death under those circumstances.

The Eleventh Circuit Court of Appeals sitting *en banc* has recently taken the opportunity to express its opinion as to the meaning of the decision in *Enmund, supra*. As noted by that court, "The question of whether a defend-

ant's culpability satisfies the eighth amendment is sufficiently distinct from the question of the defendant's guilt that a specific jury finding is not constitutionally required." *Ross v. Kemp*, 756 F.2d 1483, 1488 (11th Cir. 1985) (*en banc*). As noted by that court, the requirement that a jury find every element of the crime beyond a reasonable doubt before a defendant can be found guilty is a focus on procedural due process concerns. *Id.; see United States v. U. S. Gypsum Co.*, 438 U.S. 422 (1978). In contrast, the proportionality review contemplated by *Enmund* "is aimed at insuring that imposition of the death penalty is not excessive in light of the defendant's culpability." *Ross v. Kemp, supra, citing Enmund, supra*, 102 S.Ct. at 3377.

The inquiry mandated by this Court in *Enmund v. Florida, supra*, is simply a proportionality review and does not establish an additional element that the jury must specifically find beyond a reasonable doubt at either the guilt phase of a trial or the sentencing phase of a trial before a death penalty can be imposed. A proportionality review has long been in the province of a reviewing court and is not a function for a jury to undertake. A proportionality review is a review conducted based on the record before either the appellate court or a court on collateral review without a focus on the specific findings made by the jury.

This Court has conducted proportionality reviews in criminal cases on several occasions by examining the record presented to the Court. In *Solem v. Helm*, — U.S. —, 103 S.Ct. 3001 (1983), this Court examined a question of proportionality in relation to a criminal sentence to a recidivist. In making its analysis, the Court referred back

to the decision in *Enmund v. Florida, supra* and specifically characterized it as an application of "the principle of proportionality to hold capital punishment excessive in certain circumstances." *Solem v. Helm, supra,* 103 S. Ct. at 3008. This Court has also examined death sentences in an Eighth Amendment context on a proportionality basis in such cases as *Coker v. Georgia,* 433 U.S. 584 (1977). Similarly, the focus in the instant case is on the proportionality of the death sentence based on the evidence presented at trial in light of the culpability of the individual defendant. Such an analysis does not require a specific jury finding of culpability as was required by the Fifth Circuit Court of Appeals. The question is not whether the jury imputed intent, but whether the evidence was sufficient to conclude that the death sentence was not disproportionate based on the culpability of the individual defendant.

As found by the Eleventh Circuit Court of Appeals, amici curiae submit that *Enmund* merely requires a level of individual participation justifying the imposition of the death penalty in any given case. Thus, the holding by the Fifth Circuit Court of Appeals impermissibly extends the holding of this Court in *Enmund v. Florida, supra* by converting a proportionality review into a requirement that a jury return a specific verdict on a particular element before a death penalty can be imposed. Amici curiae submit that this is an impermissible extension of the Eighth Amendment under the facts of the instant case.

CONCLUSION

Amici curiae respectfully submit that the decision of the Fifth Circuit Court of Appeals should be reversed on the facts and on the law.

Respectfully submitted,

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